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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

GORDON K. HIRABAYASHI
vs.
THE UNITED STATES OF AMERICA. } No. 870.

MINORU YASUI
vs.
THE UNITED STATES OF AMERICA. } No. 871.

BRIEF *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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The Interest of the American Civil Liberties Union

The American Civil Liberties Union is a national organization devoted to the protection of the civil rights of the people of the United States, with particular emphasis upon those liberties guaranteed by the Bill of Rights.

Pursuant to its purpose, the American Civil Liberties Union, through its counsel, has appeared on many occasions, most frequently *amicus curiae*, in judicial proceedings, in support of the guarantees in the first ten amendments to the Constitution of the United States.

In the instant cases we are concerned primarily with maintaining, during days when our nation faces grave

military danger, and our Constitution serious stress and strain, the American constitutional way of life for which we are fighting on world-flung battle lines.

Our sole concern in these cases is in what we believe to be unwarranted and unconstitutional exercise of military power, abridging rights of American citizens of Japanese ancestry in violation of due process of law, because of the discriminatory military orders directed against persons solely because of their race or ancestry; which were, in addition, unaccompanied by any hearing of any kind. Such orders, in our opinion, violate the "rudimentary demands of justice and fair play."

More particularly our position upon the removal of citizens has been thus publicly stated by the Union:

> 1. The government in our judgment has the constitutional right in the present war to establish military zones and to remove persons, either citizens or aliens, from such zones when their presence may endanger national security, even in the absence of a declaration of martial law.
>
> 2. Such removals, however, are justified only if directly necessary to the prosecution of the war or the defense of national security.
>
> 3. Except in cases of immediate emergency, the necessity for such removals should be determined by civilian authorities, and such removals should be carried out by civilian authorities.
>
> 4. Such removals should be carried out in a manner, and based upon a classification, having a reasonable relationship to the danger intended to be met.
>
> 5. Each person affected should have an opportunity of showing that he does not come within the necessities of the situation; and hearing boards should be established to pass upon all such claims.

6. Persons so removed, unless held for other reasons, should be allowed full liberty in the United States outside of such military zones. Their property rights should be fully protected, and reasonable arrangements should be made for their resettlement in places of their own choosing outside of such zones.

Our position, fundamentally, is that in the absence of circumstances warranting martial law and in the absence of the declaration of martial law, removal of citizens from any area in the United States, deemed undesirable in any area, is the function of the *civil* rather than the military authorities. The exercise of military authority in the cases at bar seems to us to be not only unprecedented in any democratic country; but to lack warrant in our constitutional history. Always it has been our proud boast that the military are at all times subordinate to the civil powers—except only when the civil authorities were unable to function because of insurrection or invasion. Thus in the constitutions of the original states, seven contained express provisions to the effect that the military was under subordination to the civil power. All such provisions were similar to the one in the Maryland Constitution (1776), "That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power". In addition to the other seven constitutions, the Vermont Constitution also had the subordinating provision.

Our approach to this case is one of substantial accord with the views of this Court as expressed in a war three-quarters of a century ago and in this world war.

In the Civil War:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace

and covers with the shield of its protection all classes of men, at all times and under all circumstances." (*Ex parte Milligan,* 4 Wall. 2, 13.)

This War:

"We are not here concerned with any question of the guilt or innocence of petitioner. Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty." (*Ex parte Quirin,* Oct. 29, 1942, 87 L. Ed. (Adv. Op.) 1, 7.)

I

Military orders, directed only against persons of Japanese descent, as affecting American citizens, offend against the minimum guarantee of the equal protection of the laws, as incorporated in the due process clause of the Fifth Amendment.

It is true that the due process clause of the Fifth Amendment contains no such guarantee of the equal protection of the laws, as expressly provided for in the Fourteenth Amendment. Nonetheless it has been held that due process of law includes a certain minimum assurance of equality under the law.

Truax v. *Corrigan,* 257 U. S. 312, 331, so indicates:

"It (due process of law), of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application

> of the law, 'All men are equal before the law'; 'This is a government of laws, and not of men:' 'No man is above the law,' * * * are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws."

With the exception of approximately 125 persons, not enemy aliens, excluded from the Pacific Coast, the only persons similarly removed have been those of Japanese ancestry, approximately 70,000 of whom are American citizens.

The 125 thus excluded were ordered removed after only hearings. None of the 70,000 American citizens of Japanese descent was accorded a hearing of any kind.

Why this apparently discriminatory treatment? Was the discrimination due to in its entirety, or dominantly, because of racial prejudice?

There is much convincing evidence to that effect.

That bitter race prejudice against Orientals has characterized the attitude of many powerful political and pressure groups on the West Coast, and particularly in California, is rather well known. According to the Tolan Committee, agitation against Japanese, both citizens and aliens, has been a frequent factor on the Pacific Coast scene, flaring up in 1913 and recurring between 1919 and 1924 (see Tolan Committee Fourth Interim Report, supplement part 1 section A, "History of Japanese Settlement in the U. S.," p. 59).

Evidence was submitted to the Tolan Committee that race prejudice was a dominant factor in causing the evacuation of the Japanese from the Pacific Coast, citizen and alien alike. Thus the Secretary of the California State Congress of Industrial Organizations, Mr. Louis

Goldblatt testified before the Tolan Committee (Fourth Report, p. 149):

> "We feel, however, that a good deal of this problem has gotten out of hand, Mr. Tolan, inasmuch as both the local and State authorities, instead of becoming bastions of defense, of democracy and justice, joined the wolf pack when the cry came out 'Let's get the yellow menace.' As a matter of fact, we believe the present situation is a great victory for the yellow press and for the fifth column that is operating in this country, which is attempting to convert this war from a war against the Axis Powers into a war against the 'yellow peril.' We believe there is a large element of that particular factor in this present situation.
>
> "I am referring here particularly to the attack against the native-born Japanese, an attack which, as far as we can find out, was whipped up. There was a basis for it because there has always been a basis on the Pacific coast for suspicion, racial suspicion, which has been well fostered, well bred, particularly by the Hearst newspapers over a period of 20 to 25 years."

Similarly Dr. Eric C. Bellquist of the Department of Political Science of the University of California testified (Tolan Committee Fourth Interim Report, p. 150):

> "Here on the coast we have a radio commentator who reviews the news at 9 o'clock in the morning. For some time he has been urging that every Japanese, alien or citizen, be transplanted to the other side of the Rockies. In appeal after appeal he has incited the people and aroused their suspicion. We have a former far eastern newspaper correspondent who, toward the end, had difficulties in Japan and has since been reviling the Japanese in our country and urging restrictive action of

far-reaching scope against both aliens and citizens. We have certain interests in the State—some agricultural, some 'patriotic,' some closely affiliated with certain newspapers—which have long been hostile to orientals in general as well as other aliens, and which have now found a golden opportunity to come out against the Japanese on the Pacific coast. City councils and county boards of supervisors have been passing restrictive ordinances, petitioning the Congress to enact legislation against our Japanese, and in many respects take over functions properly belonging to the National Government. The mayors of our two large cities, as well as many smaller ones, have lost their composure along with the rest. The State personnel board at Sacramento has sought to take action contravening the Constitution as well as the expressed sentiment of our highest officials, including the President.

Altogether, as the committee has witnessed, the State of California, as well as Oregon and Washington, has been giving a demonstration of lack of balance and outright intolerance which will blacken its record for many years to come. If our public authorities have thus succumbed to hysteria, one can well understand, if only deplore, the housewives who dismiss Japanese gardeners and servants, and farmers who discharge help because of citizenship or extraction. On the whole, the public has not shown so much hate or spite, except as it has been incited to do so. But pressure groups and shortsighted politicians facing an election year are out for blood and wholesale internment. Jingoes are endeavoring, under the cover of wartime flag-waving patriotism, to do what they always wanted to do in peacetime—get rid of the Japanese."

Dr. Bellquist further testified:

> "In brief, up to the end of the year, there had been no panic and little infringement upon rights and liberties. The people were calm and went about their business in getting ready to face the war, maintain morale, and put forth the common effort necessary to meet and defeat the forces of brutalitarianism.
>
> This sound common-sense American attitude of doing the job and paving the way for victory was not allowed to continue, however. In January the commentators and columnists, professional 'patriots,' witch hunters, alien haters, and varied groups and persons with aims of their own began inflaming public opinion. Reason was not to be allowed to prevail. Clamor for un-American restrictive measures became rife. The ancient western curse of vigilante rule was once more raising its head.
>
> In short, there was no popular clamor for comprehensive restrictions or mass evacuation. Not until inflammatory commentators on the 'enemy alien menace' undermined popular confidence did the present hysteria arise. I cannot believe that this is just a matter of chance. * * *"*

That Lt. Gen. John L. DeWitt, the commanding general who issued the orders challenged herein, was equally the victim of such race prejudice, is proven by Gen. DeWitt himself. On April 13, 1943, Gen. DeWitt testifying at San Francisco before the House Naval Affairs Subcommittee expressed his views:

> "A Jap's a Jap and it makes no difference whether he is an American citizen or not."

Gen. DeWitt emphatically opposed efforts to bring back some of the Japanese to the West Coast.

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* *Tolan Committee Hearings*, 4th Interim Report, p. 150 ff.

It seems clear accordingly that the orders at issue in these proceedings were the result not of military necessity, but of race prejudice.

II

Failure to accord hearings to appellants and other American citizens of Japanese ancestry violates due process of law.

The need of a hearing as an indispensable prerequisite to due process seems well established.

The minimum requirements of due process are outlined in *Truax* v. *Corrigan*, 257 U. S. 312:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which *hears* before it condemns, which proceeds not arbitrarily or capriciously, but upon *inquiry*, and renders judgment *only after trial*, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

The court then cited *Hurtado* v. *California*, 110 U. S. 516, 538, at which we find:

> "Law is something more than mere will executed as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'The general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so that every Citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. * * *'"

In a later case, in *Holden* v. *Hardy*, 169 U. S. 360, 389, the court defined due process as including "certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person and property *without due notice and an opportunity to be heard in his defense.*"

In a recent decision Justice Cardozo, in *Palko* v. *Connecticut*, 302 U. S. 309, 327, stated:

> "Fundamental too, in the concept of due process; and so in that of liberty, is the thought that condemnation shall be rendered only after trial."

More recently in *Hansberry* v. *Lee*, 311 U. S. 432, the court annulled a state judgment in a class suit, because the parties thereto had not been afforded "a notice and opportunity to be heard as are requisite to the due process which the constitution prescribes."

Once again the main requirements of due process with respect to notice and hearings are considered in *Powell* v. *Ala.*, 287 U. S. 45, 68:

> "It never has been doubted by this, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process."

Other cases which have considered the principle are:

Ohio Bell Telephone Company v. *Public Utilities Commission*, 301 U. S. 292, 304.

The case dealt with an administrative tribunal and the lodging of administrative discretion in such an agency. Said the court:

> "All the more insistent is the need, when power has been bestowed so freely, that the '*inexorable safeguard*' (*St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 36, 73) * * * of a fair and open hearing be maintained in its integrity. *Morgan* v. *United States*, 298 U. S. 468, 480, 481, * * * *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88 * * * The right to such a hearing is one of 'the rudiments of fair play'. (*Chicago N. & St. P. R. Co.* v. *Polt*, 232 U. S. 165, 168 * * *) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co.* v. *Public Utilities Commission* (no. 1), (no. 2), 294 U. S. 63, 79, * * * *Brinkerhoff-Paris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 682 * * * *Cf. Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 350, *supra*. There can be no compromise on the footing of convenience or *expediency*, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

Similarly, in *Railroad Commission of California* v. *Pac. Gas & Elec. Co.*, 302 U. S. 388, 393, we find:

> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. *Ohio Bell Tel. Co.* v. *Public Util. Com.*, 301 U. S. 292, 304, 305, * * * There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, * * *"

Another administrative agency case is *Morgan* v. *U. S.*, 304 U. S. 1, 14. The court insisted that:

> "* * * the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'"

The right of a Japanese to a hearing, as an essential element of Federal due process was upheld in *Wong Wing* v. *U. S.*, 163 U. S. 140, 143, holding that a Japanese alien "* * * shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law."

Compare also the most recent case upon the subject, *Skinner* v. *Oklahoma*, 316 U. S. 535, annulling the Oklahoma sterilization law because amongst other things it condemned "without hearing, all the individuals of a class." (Concurring opinion of Chief Justice Stone.)

In the face of the clear mandate of the decisions of this Court requiring some kind of hearing as essential to due process, we now examine the claims asserted to justify failure to accord individual loyalty hearings to American citizens of Japanese ancestry who might have been suspected of disloyalty. The grounds asserted for this failure are that such hearings were impractical, on the one hand; and inadequate to cope with the alleged military danger, on the other hand.

The time-table of evacuation of itself, gives the answer. The attack on Pearl Harbor took place on December 7, 1941; Executive Order #9066 was not signed until February 19, 1942, almost two and a half months later. It was not until July 7, 1942,[1] seven full months after Pearl Harbor, that the army announced that persons of Japanese ancestry had been removed to assembly centers; and the task was not yet finished, for the transfer from assembly centers to Relocation Centers had to be achieved and this was not accomplished until early in November, 1942.[2] Not until March 14, 1943, did General DeWitt dissolve the Board that directed the West Coast evacuation. To argue that during these long months of indecision and debate, hearing boards could not have been efficiently organized is to beg the issue. It is inconceivable that this country which could gather information concerning its total manpower almost at a stroke, which could mobilize a gigantic army in a short time, which could shift from peacetime industrial organization to a war economy with impressive swiftness, could not have gathered the relevant information relating to such a small segment of its population within that period. There were those, of course, who claimed that it would have been impossible to tell the loyal from the disloyal; who said that all persons of Japanese ancestry look alike. It is a challenge to the intelligence of this nation that such childish opinions actually carried the day. Obviously, nothing can be told about the loyalty of people by looking at them, no matter what their appearance. The decision should have been made by people who trusted less to their visual impressions than to concrete information that they would have had before them. In any event, as any biologist knows there is quite as much

1. *Los Angeles Times*, July 8, 1942.
2. *Los Angeles Daily News*, November 6, 1942.

individual variation among persons of Japanese ancestry as there is within any other relative homogeneous population The truth is that it would have been relatively simple to compile information about persons of Japanese ancestry. They are not newcomers to our shores. Since total exclusion of orientals has been in effect since 1924, every adult has been here for approximately 20 years or more. These people have long records of work and residence. Their children have gone to our schools and the record of their conduct and achievement is available.

It is interesting to note that those who opposed hearing boards were the professional anti-orientalists, the politicians, and the downright ignorant. Those who had had frequent contact with persons of Japanese ancestry, clergymen, educators, and thoughtful citizens in every walk of life, were unanimously in favor of hearing boards. The Committee on National Security and Fair Play, headed by General David Barrows, Henry F. Grady, University Presidents Sproul and Wilbur, and Dr. Robert A. Millikan, urged the utilization of boards. These are persons of proved executive ability, who would not propose something unrealistic and impossible. On April 30, 1942, a group of over two hundred distinguished Americans signed a letter addressed to President Roosevelt, in which they voiced the same judgment and sentiment:

> "The immediate and specific purpose of this letter is to urge you to extend to Japanese aliens, and especially to citizens of Japanese origin, on the West Coast, the right to a hearing before civilian boards to attest to their loyalty. This should be done, if possible, before evacuation from their homes and businesses, but also, in cases where they have already been removed, in order to establish the right to return to their homes."

Those who were most familiar with the problem were most convinced that hearing boards were feasible and necessary. For instance, an intelligence officer whose very task was the investigation of persons of Japanese ancestry on the West Coast has written:

> "At each assembly or relocation center, boards for the purpose of review of such cases should be set up. The boards should consist of representatives of the military service, of the Department of Justice, and of the War Relocation Authority. These boards are for the express purpose of deciding on the points of logic and reason and in view of the circumstances in each case, whether or not the individual is to be considered in the class of the potentially dangerous. • • •
>
> "To sum up, the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people. It should be handled on the basis of the individual, regardless of citizenship and not on a national basis."[3]

The amazing thing is that while hearings have not been arranged for Japanese residents and citizens of Japanese ancestry against whom no charges were made, hearings are being held for enemy aliens arrested upon suspicion of subversive activities or connections. In January, 1942, the Attorney General announced that 92 such alien hearing boards had been established in the federal jurisdictional districts. Of these alien hearing boards, James G. McDonald has written in the New York Times, the civilian hearing boards which have been examining those already apprehended by the Federal Bureau of Investigation have done an excellent piece of work. Their

3. "The Japanese in America," *Harpers Magazine*, October, 1942, pp. 496-497.

record justifies Attorney General Biddle's judgment in calling them into being.[4]

The irrefutable proof that hearing boards were feasible and adequate is found in the English experience. When England went to war, there were more than 74,000 enemy aliens on the Island. In the first weeks of the conflict, they were ordered to register. Immediate investigations of these people were begun. 112 alien tribunals were organized all over the country. Without any difficulty 74,220 cases were examined in six months. The first 64,000 (Class C) were exempted from internment or special restrictions. Only 2,000 were interned.[5] In describing the English experience, Kempner concludes:

> "In this war, as we see, it is more important to inquire into the fundamental spiritual loyalties of a person than the formal facts concerning his national origin and previous residence."

When in the Spring of 1940, Germany unleashed her full power and crushed France, a reaction, born of panic and despair, temporarily engulfed the British Isles. The fear of Fifth Column activities arose and popular pressure for the internment of all aliens was exerted.

As Maximilian Koessler has written:

> "Reluctantly the Government, as a result of pressure from the military set, gave way to this tendency, but it did so gradually."[6]

Interestingly enough all the superficial arguments which were used on the West Coast to facilitate the

4. *New York Times*, April 6, 1942.
5. Robert M. W. Kempner, "The Enemy Alien Problem in the Present War." *American Journal of International Law*, Vol. 34, No. 3, July, 1942, pp. 444-446.
6. Maximilian Koessler, "Enemy Alien Internment, With Special Reference to Great Britain and France. *Political Science Quarterly*, Vol. 57, March, 1942, p. 104.

evacuation of those of Japanese ancestry were used in England at this time against the enemy aliens there. It was charged that Hitler had planted spies and saboteurs in England in the guise of refugees. It was charged that the aliens since they looked and acted and could speak like the potential invaders, would give them unqualified assistance. It was argued that there was no way in which loyalties could be finally ascertained. On June 21, 1940, the date of the fall of France, the liberal policy was reversed and general internment was approved.

But even the fact that the Germans were but 20 miles from England could not keep this policy from being a center of debate. There were those, of course, who argued for the treatment of people in the mass or as members of a class, rather than as individuals. On August 22, 1940, a member of the House of Commons, Mr. Pickthorn, introduced this policy by an argument which is not unfamiliar:

> "If an archangel appeared before all the members of the War Cabinet at once and said, 'There is one red-headed man in England who unless care is taken, will do something to injure the State', I think it would be the duty of the War Cabinet to see that all red-headed men were interned. • • •"[7]

But the Pickthorns of England, unlike their counterparts in this country, did not for long have their way. Our own Attorney General has described what happened:

> "We may well keep the experience of England before us and profit thereby. According to Sir Norman Birkett, at the outbreak of the war there were in that country 74,200 German and Austrian aliens, mostly Jewish refugees. England began by classifying her alien enemies, and interned only 568

7. *Ibid.*, p. 105.

at the start of the war. However, by August of 1940, the customary reserve of the British had given way to panic at the spectacle of what the Fifth Column had done to France and the low countries. The Government yielded to the pressure, and all aliens were thrown into hastily laid out camps.

"Conditions there were bad. Britons themselves deplored the error. Sir John Anderson, then Home Secretary, said the wholesale interment had victimized 'some of the bitterest and most active enemies of the nazi regime.' Said Rhys Davies: 'I am sure the treatment meted out to our alien population in the last few months is not the result of cruel intention but of panic and sheer stupidity.' A letter to the Times, signed by a group of Prominent Londoners, among them H. G. Wells, included the opinion that 'nothing could be more calculated to dishearten our friends and allies in Germany and Austria than the news that Britain had put under lock and key her own anti-Nazis of German and Austrian origin.' Then the reaction set in. The British public, having undergone a few bombing raids, ran true to form. In real danger, the British forgot their fears. Letters began pouring in to the internees at the rate of 120,000 a week. Pressure again was exerted on public officials. Picking and choosing started all over again. Today, in Great Britain, Canada, and Australia combined, the internees total about 15,000."[8]

After English common sense had reasserted itself, Home Secretary Herbert Morrison was able to say, on October 8, 1941:

"There is among us today a degree of national unity as nearly absolute as anything human can be.

8. Francis Biddle, "The Problem of Alien Enemies," *Free World*, August 1942, Vol. III, No. 3, pp. 201-4.

> There may be a tiny minority with special views, but it is not one percent. I have let go most of our small band of Fascists and Mosleyites because they are no longer potential dangers to the country. We have only 697 British subjects interned, and of these 317 are of enemy origin. Of scores of thousands of aliens, only 9,700 are still detained. A democracy confident of its cause and of itself does not need to use a big stick at home."[9]

There have been constant calls from informed persons in the United States for our authorities to utilize the English experience. So long ago as April 6, 1942, McDonald wrote in his New York Times article:

> "With the evidence of England's experience before us we should not be reluctant to reach the same conclusions about aliens resident in this country. If, as the President, our Federal agencies, and those who have intimate knowledge of our alien population believe, and as the experience of the last war demonstrated, we shall eventually be convinced that the great majority of our alien population is loyal, it is but good judgment and statesmanship to reach this decision at the earliest possible moment. Civilian hearing boards are the obvious answer. They should be set up immediately."[10]

It is to be noted, moreover, that despite the recurrent danger of imminent invasion, England at no time resorted to the method of discrimination, wholesale evacuation or internment of its citizens of German or any other ancestry.

Unfortunately, most of our own officials have been woefully lax and uninformed in relation to the entire problem. On March 6, 1942, Dr. Felix Guggenheim, who

9. Alan Cranston, "Enemy Aliens," *Common Ground*, Winter, 1942, p. 111.
10. McDonald, James G., *New York Times*, April 6, 1942.

had been in England when the war broke out described the details of the English experience for the Tolan Committee.[11] It is obvious from their comments that the members of the Tolan Committee were hearing about the subject for the first time. Later in the day Mr. Tom C. Clark, Chief of the Civilian Staff of General John L. DeWitt, appeared before the Tolan Committee. Mr. Clark of all people should have been entirely conversant with the history of the English situation. Instead, when the committee members mentioned that they had heard testimony concerning England's identical problem and asked Mr. Clark whether he was "familiar with England's experience on that", Mr. Clark answered "No".[12] This evidences then that delay and uncertainty ruled at the time that hearing boards should have been in operation. Thoughtful and able citizens who had concrete plans for hearing boards were ignored. Parallel situations in other countries, particularly in England were likewise ignored. It was left to Imperial England to demonstrate how Democratic America should have solved this internal problem.

Conclusion

We are at war. We are fighting for our lives—as well as our rights.

And yet we must bear in mind that war does not suspend the Constitution, nor dissolve the Bill of Rights.

Chief Justice Hughes, who has emphasized the importance of preserving the war power on numerous occasions, summarized our position in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 390, 426:

11. *Tolan Committee Hearings*, Part 31, pp. 11733-11737.
12. *Tolan Committee Hearings*, Part 31, p. 11784.

> "* * * war power is the power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the Nation. *But even the war power does not remove constitutional limitations safeguarding essential liberties.*" (Italics ours.)

Similarly, Justice Brandies recognized the paramount authority of the Constitution, in war times equally as in peace, in *Hamilton* v. *Kentucky Distilleries*, 251 U. S. 146:

> "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations."

And in *Sterling* v. *Constantin*, 287 U. S. 378, a unanimous Supreme Court pointed out that even as to the military authorities both in war and in peace there is "no avenue of escape from the paramount authority of the Federal Constitution."

We, of course, make no claim for "absolute" constitutional rights; we appreciate that during war many of the liberties of the people must yield to imperative and immediate military necessity; and that such abridgment of rights do not offend constitutional guarantees if their denial is "*directly related*" to such military need.

When a nation is fighting for world freedom over far-flung battle grounds around the globe, however, it is vital that those freedoms be preserved at home, except only where clear military necessity, in each particular case, may make abridgment imperative.

"The country must be preserved, but in a way that is worth preserving." *Ex parte Milligan*, 4 Wall. 2, 126.

The judgment below should be reversed.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
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